



BEFORE THE  
SURFACE TRANSPORTATION BOARD

TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

EXPEDITED CONSIDERATION  
REQUESTED

Docket No. NOR 42121

ENTERED  
Office of Proceedings

MAY 16 2011

229530

Part of  
Public Record

MOTION TO REDESIGNATE

Pursuant to Paragraph 2 of the June 23, 2010 Protective Order governing this proceeding (“Protective Order”), CSX Transportation, Inc. (“CSXT”) respectfully requests that the Board order Total Petrochemicals USA, Inc. (“TPI”) to redesignate as “Confidential” certain workpapers and exhibits to TPI’s Opening Market Dominance Evidence that TPI has designated “Highly Confidential”: specifically (1) TPI Exhibit II-B-9 (reproduced herein as Exhibit A); and (2){ {

}} While TPI touts this evidence as the most important and probative evidence of CSXT’s alleged market dominance, it has refused to allow knowledgeable CSXT personnel to review that evidence or to be advised of its contents. The documents in question are simply not the sort of competitively sensitive information that warrants a Highly Confidential designation, and redesignation of this evidence as “Confidential” is essential to allow them to be viewed and analyzed by the CSXT in-house personnel who are most able to respond to the allegations in that evidence. Failure to redesignate these documents would substantially prejudice CSXT’s ability to fully reply to TPI’s allegations and would raise serious due process issues.

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In qualitative market dominance evidence that has been sponsored by TPI's in-house transportation logistics personnel, *see* TPI Opening Market Dominance Evidence at II-B-1 n.1, TPI claims that the primary reason that CSXT is market dominant is the fact that TPI's customers supposedly "require" rail delivery. Indeed, TPI unequivocally asserts that "[i]n this proceeding, the 'needs' of TPI's customers are paramount in the establishment of CSXT's market dominance." *Id.* at I-7. In support of this claim, TPI has produced TPI Exhibit II-B-9, {{ }}<sup>1</sup> and {{

}} These documents, {{

}} In order to respond to TPI's allegations regarding customer needs and preferences, CSXT personnel must know what those allegations are. Yet TPI's designation of those allegations as Highly Confidential precludes CSXT from reviewing and responding to those allegations. The most qualified persons to analyze and respond to these assertions are CSXT's in-house marketing and operating personnel, many of whom have years of experience in the market for plastic polymers transportation and {{

}} TPI's refusal to redesignate these materials hampers CSXT in evaluating and responding to what TPI claims is the linchpin of its market dominance case, and is substantially prejudicing CSXT's ability to prepare reply market dominance evidence.

In light of the accelerated schedule for market dominance evidence in this proceeding, CSXT respectfully requests that the Board give expedited consideration to this motion. In order

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<sup>1</sup> Highly Confidential information is marked with double brackets, *e.g.*, ("{{}}"). As explained herein, CSXT does not believe that the materials are properly designated as Highly Confidential, but CSXT will respect TPI's designation until TPI withdraws it or the Board orders TPI to do so.

to avoid disturbing the procedural schedule, CSXT asks the Board to order TPI to respond to this Motion no later than Thursday, May 19 and that the Board decide this Motion by Monday, May 23. If the Motion is not decided by that date, CSXT asks in the alternative that the Board extend CSXT's time to file reply evidence until fourteen days after an order requiring TPI to redesignate the materials at issue.

## **I. BACKGROUND**

TPI submitted Opening Market Dominance Evidence on May 5, 2011. According to TPI's evidence, the "single most important fact" the Board should consider when determining the effectiveness of intermodal competition is that TPI's customers allegedly "require" rail delivery. Opening Market Dominance Evidence at II-B-16; *see also id.* at II-B-16—27 (discussing alleged reasons why TPI customers prefer rail delivery). The core of TPI's market dominance case is not a claim that transporting plastic polymers by truck or rail-truck transloading is logistically infeasible,<sup>2</sup> but rather that the needs of TPI's customers require TPI to deliver products in railcars rather than trucks. While TPI's generalized assertions about the reasons customers might prefer rail have been designated public or Confidential, nearly all of its lane-specific allegations are designated Highly Confidential. For example, TPI provides five reasons why CSXT possesses market dominance over Lane B-14, and designated four of them as highly confidential (thus shielding them from review by the allegedly market dominant carrier). *See id.* at II-B-58.

CSXT does not question TPI's use of a Highly Confidential designation for {{

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<sup>2</sup> Indeed, TPI admits that it regularly ships the issue commodities by truck. *See* TPI Opening Market Dominance Evidence Ex. II-B-2.

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}} But TPI has not limited its use of the Highly Confidential designation to that sort of competitively sensitive information – instead, it also applied it to {{

}}

Because CSXT's in-house marketing and operating personnel are best-positioned to respond to {{

}} and Exhibit II-B-9. *See* P. Moates Letter to J. Moreno at 1 (May 6, 2011) (attached as Exhibit C); M. Warren email to J. Moreno (May 8, 2011) (attached as Exhibit D). TPI refused, claiming that the “information contained in them, {{

}} is competitively sensitive.” *See* J. Moreno Letter to P. Moates at 1 (May 9, 2011) (attached as Exhibit E). TPI also alleged that {{

}} *Id.* On May 13, CSXT reiterated its request for redesignation,

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arguing that CSXT had a compelling need to share these {{ }} with the CSXT personnel able to address them, that there was nothing competitively sensitive in the documents that could not adequately be protected by a Confidential designation, {{ }} See P. Moates Letter to J.

Moreno (May 13, 2011) (attached as Exhibit F). TPI once again rejected CSXT's request on the evening of May 13, claiming that CSXT's marketing personnel did not need to know {{

}} See J. Moreno Letter to P. Moates at 1 (May 13, 2011) (attached as Exhibit G). {{

}} Because TPI's intransigence has seriously impaired CSXT's ability to respond to the specific market dominance evidence TPI has put forward, CSXT filed this Motion to redesignate the documents as Confidential.

**II. THE MATERIAL AT ISSUE IS NOT PROPERLY DESIGNATED HIGHLY CONFIDENTIAL, AND TPI'S DESIGNATIONS HAVE PREJUDICED CSXT'S ABILITY TO PREPARE REPLY EVIDENCE.**

Material may be designated Highly Confidential and shielded from review by in-house personnel only if that material contains "specific rate, traffic, or cost data or other competitively sensitive information." Protective Order ¶ 2, *TPI v. CSXT*, STB Docket No. 42121 (June 23, 2010). Other proprietary or confidential information may be designated Confidential – a designation that requires the information to be used solely for purposes of this proceeding and limits disclosure to in-house personnel who have agreed to be bound by the Protective Order and who have a need to know the information for purposes of this proceeding. *Id.* at ¶ 1.

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While the Board has rarely needed to explore the precise boundary between the “Confidential” and “Highly Confidential” designations, it has made clear that any confidentiality designation must strike an “appropriate balance between legitimate access and legitimate protection.” *Central Oregon & Pac. R.R., Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas, and Lane Counties, OR*, STB Docket No. AB-515 (Sub-No. 2), at 4 (Aug. 15, 2008). In striking that balance, the Board should be mindful of its recognition of the important insights that in-house personnel bring to the analysis of evidence in a rate proceeding.<sup>3</sup> Here, where the documents in question do not contain any competitively sensitive information, where TPI heavily relies on them in its evidence, and where the persons most able to evaluate and rebut the lane-specific allegations are CSXT personnel with detailed knowledge and experience with the case lanes, the balance weighs strongly in favor of redesignating these materials as Confidential.

**A. The Materials At Issue Are Not Highly Confidential.**

The Highly Confidential designation is generally associated with the most sensitive and confidential information, such as information about confidential contracts, rate and cost information, and information subject to the statutory protections of 49 U.S.C. § 11904. The language of the Board’s standard protective order reflects this fact by describing Highly Confidential information as “material containing specific rate, traffic, or cost data or other competitively sensitive information.” Protective Order ¶ 2, *TPI v. CSXT*, STB Docket No. 42121 (June 23, 2010). TPI admits that none of the information at issue relates to rates, costs, or traffic,

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<sup>3</sup> See *Proceedings to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand Alone Cost Methodology*, 6 S.T.B. 805, 814 (2003) (“[I]n-house personnel have an important role to play in rail rate proceedings, as well as a right to actively participate in any litigation to which their employer is a party.”).

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but claims that it is nonetheless Highly Confidential because TPI unilaterally has declared it to be “competitively sensitive.”

In its correspondence with CSXT, TPI has made two arguments to support this claim. First, TPI simply asserted without explanation that information about a customer’s specific reasons for preferring rail service might be “competitively sensitive” as to TPI or its customers. *See* Exhibit E at 1. Even a cursory review of the documents in question thoroughly debunks this claim. Generalized allegations about customer’s silo capacity, purchase of off-grade products, or concerns about product contamination or truck congestion are plainly not the sort of competitively sensitive information that cannot be disclosed to in-house personnel without risking competitive harm. Moreover, TPI’s position is not logical. TPI appears to be asserting that it could suffer competitive harm by telling CSXT the factors that TPI claims prove a lack of effective competition. If TPI truly believes that there is a lack of effective competition on the issue lanes, then it is difficult to imagine what “competitive harm” could result from TPI telling CSXT the reasons it thinks effective competition does not exist.

Second, {{

}} This reckless and unfounded assertion should be dismissed out of hand.

{{

}} In short, TPI's speculative and unsupported allegation cannot justify a Highly Confidential designation.<sup>4</sup>

**B. CSXT's In-House Personnel Have a Compelling Need to Review the Improperly Designated Materials.**

While CSXT would not ordinarily move to challenge an overly restrictive confidentiality designation, CSXT has been forced to do so in this case because TPI claims the improperly designated documents are a central pillar of its case, and CSXT's in-house experts likely could offer significant insights into those documents. TPI expressly asserts that "the single most important fact" the Board should consider when determining the effectiveness of intermodal competition is the fact that TPI's customers supposedly "require" TPI to deliver product via rail. See TPI Opening Market Dominance Evidence at II-B-16. {{

}} Fundamental fairness requires allowing the CSXT in-house personnel most familiar with the customers and destinations at issue an opportunity to respond to these allegations.

CSXT personnel are knowledgeable about the transportation markets at issue in this case and regularly deal with the facilities and customers at many of the issue destinations. No outside logistics expert – and certainly not outside counsel – can replicate the knowledge and experience that CSXT personnel have about each of the specific lanes at issue. TPI complains that CSXT

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<sup>4</sup> {{

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has not provided specific examples of instances where in-house employees could provide helpful feedback. But it is of course impossible for CSXT to give examples of how its in-house employees could respond to specific allegations without disclosing those allegations to in-house personnel. CSXT's counsel can represent that its in-house personnel have significant knowledge and experience {{ }}, and that counsel believes that in-house personnel may have significant insights into {{ }}

Indeed, it is worth noting that TPI's qualitative market dominance evidence was primarily sponsored by four in-house TPI employees, including managers responsible for TPI's transportation and distribution sourcing and supply chain strategy. It is plainly unfair for TPI to develop evidence utilizing its in-house marketing personnel while using confidentiality designations to prevent CSXT from consulting its in-house experts to respond to that evidence.

TPI also claims that CSXT's in-house personnel do not need to know {{

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<sup>5</sup> See TPI Ex. II-B-1 {{

}}

<sup>6}}</sup> Forcing CSXT to waste valuable time instead of allowing it to focus on the actual market dominance allegations TPI has made is not reasonable, particularly given the extraordinarily compressed schedule for preparation of reply market dominance evidence.

Finally, allowing TPI's Highly Confidential designation of these documents to stand would raise serious due process issues. The only evidence that TPI has adduced to support what it says is "the most important fact" the Board must consider as to market dominance is evidence that TPI refuses to disclose to the CSXT personnel most able to refute it. TPI's only response to this obvious due process problem has been to bluster that the allegations at issue are about the customer's needs and not directly about CSXT. *See* May 13 J. Moreno Letter at 4 n.1. That is utterly beside the point – what matters is that TPI is relying on the allegations to show CSXT's market dominance while refusing to allow those allegations to be disclosed to the CSXT personnel most able to respond to them. TPI can debate if it wishes whether its claim that CSXT is market dominant for reasons that it cannot be told (and implicitly does not already know) is Kafkaesque (see Ex. F at 2 & n.2) – what cannot be debated is that an agency decision based on evidence that has never been disclosed to the CSXT personnel most able to rebut it would be arbitrary and capricious, and would flout fundamental requirements of due process that are the very foundation of the adversarial process and reasoned agency adjudication.

\* \* \*

In conclusion, the documents at issue do not contain any information with the sort of competitive sensitivity that would justify a Highly Confidential designation. Moreover, the

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<sup>6</sup> {{

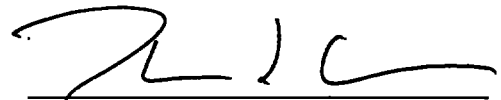
}}

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manifest unfairness in TPI's reliance on {{ }} that TPI will not allow to be disclosed to the CSXT personnel most able to rebut that evidence strongly tips the balance of equities in favor of redesignating these documents as Confidential.

For these reasons, CSXT respectfully requests that the Board order TPI to redesignate Exhibit II-B-9 and {{ }} as Confidential. In light of the compressed procedural schedule, under which CSXT's Reply Evidence is due Monday, June 6, CSXT further requests that the Board expedite its consideration of this Motion by: (i) ordering TPI to respond to this Motion by Thursday, May 19; (ii) issuing a decision on this Motion as soon as practicable, and if at all possible by Monday, May 23; and (iii) in the alternative, extending the procedural schedule by at least fourteen days after an order redesignating Exhibit II-B-9 and {{ }} as Confidential.

Respectfully submitted,



G. Paul Moates  
Paul A. Hemmersbaugh  
Matthew J. Warren  
Hanna M. Chouest  
Marc A. Korman  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
(202) 736-8711 (fax)

*Counsel to CSX Transportation, Inc.*

Dated: May 17, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of May, 2011, I caused a copy of CSX Transportation, Inc.'s foregoing Motion to Redesignate to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno  
David E. Benz  
Thompson Hine LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036



Eva Mozena Brandon

# Exhibit II-B-9





SIDLEY AUSTIN LLP  
1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
(202) 736 8000  
(202) 736 8711 FAX

pmoates@sidley.com  
(202) 736-8175

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May 6, 2011

**By Email and First Class Mail**

Jeffrey O. Moreno  
Thompson Hine LLP  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036

Re: *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42121

Dear Jeff:

We write with respect to the {{ }} Total Petrochemicals USA, Inc. ("TPI") included in the {{ }} folder of the electronic workpapers for its Opening Market Dominance Evidence. TPI designated these {{ }} as "Highly Confidential."

Designating these {{ }} as "Highly Confidential" does not appear to be justified. The designation is reserved for "material containing specific rate, traffic, or cost data or other competitively sensitive information." See Protective Order ¶ 2, *TPI v. CSXT*, STB Docket No. 42121 (June 23, 2010). {{ }}

In addition, the designation handicaps CSXT's ability to develop reply evidence. Outside counsel and consultants do not have knowledge about the specific transportation circumstances {{ }} Only CSXT personnel can provide that information, but the current, highly restrictive designation does not allow them to see {{ }}

We request that you withdraw the "Highly Confidential" designation and redesignate the affidavits as either public or "Confidential." Should you decline, please provide your justification for doing so. We ask that you provide your response to this letter as promptly as



Jeffrey O. Moreno  
May 6, 2011  
Page 2

possible, and in no event later than next Wednesday, May 11, 2011, so that if you reject our request, we may promptly seek relief on an expedited basis from the Board.

Sincerely,

A handwritten signature in black ink, appearing to be "G. Paul Moates".

G. Paul Moates  
Matthew J. Warren



---

**From:** Warren, Matthew J  
**Sent:** Sunday, May 08, 2011 8:38 PM  
**To:** Moreno, Jeffrey  
**Cc:** Benz, David; Moates, G. Paul; Hemmersbaugh, Paul A.  
**Subject:** TPI v. CSXT

Jeff,

Exhibit II-B-9 to TPI's Opening Market Dominance is an October 15, 2010 email from a representative of Double H Plastics discussing its use of railroad hopper cars for storage. TPI has designated this email as "Highly Confidential" and places substantial reliance on it in its evidence (including a three-paragraph block quote on page II-B-19). Like {} discussed in CSXT's May 6, 2011 letter, Exhibit II-B-9 does not appear to qualify for the restrictive highly confidential designation of the Protective Order. Moreover, TPI's decision to designate Exhibit II-B-9 as highly confidential (and to prevent its allegations from being viewed by the in-house CSXT personnel most able to respond to this kind of customer assertion) substantially prejudices CSXT's ability to prepare reply evidence.

We request that TPI withdraw the highly confidential designation for Exhibit II-B-9 and re-designate this Exhibit as public or confidential. Should you decline, please provide your reasons for doing so. We ask that TPI respond as soon as possible, and in all events by Wednesday, May 11.

Matt

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**From:** Warren, Matthew J.  
**Sent:** Friday, May 06, 2011 4:54 PM  
**To:** 'Moreno, Jeffrey'  
**Cc:** Benz, David; Moates, G. Paul; Hemmersbaugh, Paul A.  
**Subject:** TPI v. CSXT

Jeff,

Please see the attached letter regarding TPI's designation of certain workpapers to its market dominance evidence as Highly Confidential. CSXT requests that TPI respond to this letter as soon as possible, and in all events by Wednesday, May 11.

Matt

Matt Warren  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005  
(202) 736-8996 (voice)  
(202) 736-8711 (fax)



ATLANTA

CINCINNATI

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DAYTON

WASHINGTON, D.C.

May 9, 2011

*By E-Mail and First Class Mail*

G. Paul Moates  
Matthew J. Warren  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005

**{{ CONTAINS HIGHLY  
CONFIDENTIAL INFORMATION —  
SUBJECT TO PROTECTIVE  
ORDER }}**

RE: **TOTAL Petrochemicals USA, Inc. v. CSX Transportation, Inc. et al., STB  
Docket No. 42121**

Dear Paul and Matt:

I am writing in reply to your May 6, 2011 letter and May 8, 2011 e-mail requesting that TOTAL Petrochemicals USA, Inc. ("TPI") remove the "Highly Confidential" designations in TPI's Opening Market Dominance Evidence of {{

}} the customer e-mail in Exhibit II-B-9. TPI has designated the {{

}} e-mail as "Highly Confidential" because the information contained in them,

{{ }} is competitively sensitive.<sup>1</sup>

{{

}}

Furthermore, there is information {{ }} that is competitively sensitive, because CSXT is unlikely to be aware of those facts. For example, CSXT personnel are unlikely to have knowledge of a customer's silo capacity, ability to accept truck deliveries, purchase of off-grade commodities, responsibility for subsequent transportation from a bulk terminal, extra costs for truck deliveries, or product contamination concerns. Not only would this information be competitively sensitive as to TPI in its relationship to CSXT, but it also may be competitively sensitive to TPI's customers.

<sup>1</sup> For that reason, TPI has designated all references to {{ }} in this letter as "Highly Confidential" and requests that CSXT do the same with respect to its May 6, 2011 letter and any further correspondence concerning this subject.

Jeff.Moreno@ThompsonHine.com Phone 202.263.4107 Fax 202.331.8330

233441.2

THOMPSON HINE LLP  
ATTORNEYS AT LAW

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**EXHIBIT E**

May 9, 2011

Page 2

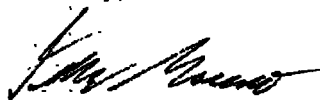
It is difficult to conceive how CSXT's ability to prepare its reply evidence is prejudiced even minimally by TPI's "Highly Confidential" designations. As noted above, internal CSXT personnel are unlikely to have any knowledge of the subject matter {{ }} in Exhibit II-B-9. Indeed, to make them aware of such facts could prejudice TPI and its customer, which is why TPI has designated this evidence as "Highly Confidential." To the extent that CSXT's internal personnel might have such knowledge, CSXT's outside counsel and consultants can inquire about that knowledge in any case lane {{

}} Moreover, the principal objective served by {{ }} Exhibit II-B-9 is to reinforce the independently alleged fact that TPI's customers require rail service. The reasons why they require rail service are less important than the fact that there is such a requirement.

For the foregoing reasons, TPI declines to modify its "Highly Confidential" designation of {{ }} Exhibit II-B-9, based upon the assertions in your letter and e-mail. {{

}} To the extent that you contend CSXT is prejudiced by these designations, please be more specific as to how, so that we can determine if there is an acceptable middle-ground for both TPI and CSXT. TPI is sending you this letter in advance of your May 11th deadline for a response, so that a prompt reply by CSXT might facilitate a resolution within your timetable.

Sincerely,



Jeffrey O. Moreno



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HONG KONG	TOKYO
LONDON	WASHINGTON, D C

FOUNDED 1866

May 13, 2011

**By Email and Hand Delivery**

Jeffrey O. Moreno  
Thompson Hine LLP  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036

Re: Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., STB Docket No. 42121

Dear Jeff:

We are writing in response to your May 9, 2011 letter attempting to justify Total Petrochemicals USA, Inc.'s ("TPI's") decision to designate as Highly Confidential all information contained in Exhibit II-B-9 to TPI's opening market dominance evidence and the {{ }}<sup>1</sup> in its workpapers. The effect of TPI's designation is to prohibit any CSX Transportation, Inc. ("CSXT") employee – including CSXT marketing personnel who are well-acquainted with the transportation market for plastic polymers and with many of the destination facilities at issue in this case – from seeing evidence that TPI has made a central pillar of its claim that CSXT is market dominant over the issue traffic. TPI's decision to designate these documents as highly confidential and thereby prevent the CSXT marketing personnel most able to rebut the allegations in those documents from even knowing of their existence is not justified. If TPI does not withdraw those designations immediately, CSXT will seek relief from the Board.

According to TPI, "the single most important" piece of evidence the Board should consider when determining the effectiveness of intermodal competition is the fact that TPI's customers supposedly "require" TPI to deliver product via rail. *See* TPI Opening Market Dominance Evidence at II-B-16. The evidence of these requirements is largely sponsored by four in-house TPI employees, including managers responsible for TPI's transportation and distribution sourcing and supply chain strategy. It is not surprising that TPI would choose to have these in-house logistics personnel develop TPI's claims about the market for transportation of the issue movements, since those personnel likely have more knowledge about those markets

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<sup>1</sup> While we do not agree with the highly confidential designation TPI has ascribed to these documents, we will respect TPI's designation until TPI withdraws it or the Board orders TPI to do so. Highly confidential information is marked with double brackets, e.g., ("{{ }}").



Jeffrey O. Moreno  
May 13, 2011  
Page 2

than TPI's counsel or its cost consultants. What is surprising is that TPI would attempt to cripple CSXT's ability to respond to those allegations by designating almost every single piece of customer-specific evidence in TPI's filing as "highly confidential," and therefore preventing the CSXT marketing personnel most able to respond to those customer-specific allegations from even knowing what they are. {{

}}

Neither of TPI's two justifications for its restrictive designations of this critical element of its market dominance evidence has merit. First, TPI's claim that CSXT marketing personnel would not be likely to have any information to shed on the customer-specific allegations in the {{ }} is ludicrous. CSXT's in-house personnel are intimately familiar with the transportation markets at issue in this case and regularly deal with the facilities and customers at many of the issue destinations. No outside logistics expert – and certainly not outside counsel – can replicate the knowledge and experience that CSXT personnel have about each of the specific lanes at issue. It is plainly unfair for TPI to develop evidence utilizing its in-house marketing personnel while using confidentiality designations to prevent CSXT from consulting its in-house experts to respond to that evidence.

There is no merit to TPI's suggestion that it is sufficient for CSXT's counsel to generally consult with CSXT marketing personnel about the case lanes and that there is no need for those marketing personnel to know the specific allegations TPI is making about each lane. TPI has the burden to produce evidence that CSXT is market dominant over the issue traffic, and CSXT has the right to reply to the specific market dominance evidence TPI has put forward. Indeed, TPI's claim that CSXT is market dominant because of factors that "CSXT is unlikely to be aware of" and cannot even be told about without supposedly "prejudicing" TPI is reminiscent of Franz Kafka. But while Joseph K. never found out the "someone [who] was telling lies about" him,<sup>2</sup> fundamental principles of due process prevent TPI from claiming that CSXT is market dominant based on evidence that TPI will not allow to be disclosed to the CSXT personnel most able to rebut it.

Second, {{

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<sup>2</sup> Cf. FRANZ KAFKA, THE TRIAL ("Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning.").



Jeffrey O. Moreno  
May 13, 2011  
Page 3

<sup>3</sup>}}

At most, the documents at issue should be designated "Confidential." A confidential designation would require any CSXT personnel reviewing these documents to sign an undertaking to the protective order and to agree to only use confidential information for purposes of this litigation. This is more than adequate to protect the information at issue here, which is plainly not the sort of sensitive rate, cost, and traffic data for which the highly confidential designation is reserved.

We hope that the parties can resolve this issue without burdening the Board, but allowing TPI to maintain a highly confidential designation for {{ and for TPI Exhibit II-B-9 would force CSXT to defend one of the key allegations in TPI's Opening Evidence with one hand tied behind its back. Please inform us no later than Monday, May 16 whether TPI will withdraw the highly confidential designation for these documents. If TPI does not do so, CSXT will move the Board to force TPI to withdraw the improper designations. Although CSXT would certainly ask the Board to grant relief as quickly as possible, the time required for TPI to file a reply and for the Board to issue a decision would almost certainly require CSXT to request an extension of the procedural schedule to permit CSXT personnel sufficient time to develop reply evidence addressing the allegations in these documents.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Paul Moates".

G. Paul Moates  
Matthew J. Warren

---

<sup>3</sup> {{

}}



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DAYTON

WASHINGTON, D.C.

May 13, 2011

*By E-Mail and First Class Mail*

G. Paul Moates  
 Matthew J. Warren  
 Sidley Austin LLP  
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 Washington, DC 20005

**{{ CONTAINS HIGHLY  
 CONFIDENTIAL INFORMATION —  
 SUBJECT TO PROTECTIVE  
 ORDER }}**

RE: TOTAL Petrochemicals USA, Inc. v. CSX Transportation, Inc. et al., STB  
 Docket No. 42121

Dear Paul and Matt:

I am writing in reply to your letter of today's date, which is a continuation of the May 6, May 8, and May 9, 2011 correspondence between CSX Transportation, Inc. ("CSXT") and TOTAL Petrochemicals USA, Inc. ("TPI") regarding the "Highly Confidential" designations in TPI's Opening Market Dominance Evidence of {{  
 }} the customer e-mail in Exhibit II-B-9. Despite CSXT's arguments to the contrary, TPI has properly designated the {{  
 }} e-mail as "Highly Confidential" because they are competitively sensitive.

CSXT's description of the scope of the Protective Order is far too narrow. Paragraph 2 states:

Any party ... submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing specific rate, traffic, or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." (underline added)

CSXT's characterizations of the Protective Order consistently have omitted the reference to "other competitively sensitive information." Indeed, the scope of the "Highly Confidential" designation is for all competitively sensitive information, of which the rate, traffic and cost data to which CSXT repeatedly refers is but an example, not the definition, of such information.

TPI fully explained the competitively sensitive nature of the {{  
 }} e-mail in its May 9th letter. Nothing in your most recent letter challenges TPI's explanations, other than to assert that this information is not rate, traffic or cost data.

Your allegation that CSXT is prejudiced by the "Highly Confidential" designation of this material simply does not withstand scrutiny. {{

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EXHIBIT G

**May 13, 2011**  
**Page 2**



**May 13, 2011**  
**Page 3**

May 13, 2011

Page 4

}}

I continue to find it difficult to conceive how CSXT's ability to prepare its reply evidence is prejudiced by TPI's "Highly Confidential" designations. Despite my May 9th invitation for CSXT to more fully explain its supposed prejudice, your letter is loaded mostly with unsupported assertions. Although you generically describe as "ludicrous" TPI's claim that CSXT personnel are not likely to possess knowledge of most matters {{

}}, you have not identified a single such matter. To the extent that CSXT personnel may possess knowledge of any matter, they can fully address it {{

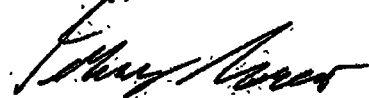
}} CSXT personnel also are able to contact TPI's customers to discuss these matters {{

}} Just because TPI has designated {{}} "Highly Confidential" does not place the subject matter off limits to CSXT personnel. Thus, contrary to your assertion, TPI's confidentiality designations do not preclude you from consulting with CSXT personnel to respond to the alleged matters.<sup>1</sup>

To the extent that there may be any doubt as to what material TPI considers "Highly Confidential," you are free to solicit the knowledge of CSXT personnel regarding the subject matter of the bullet points {{}} in the manner described above for each bullet (i.e. posing questions regarding their scope of knowledge). TPI is not willing, however, to permit you to share the fact that {{

}} With this clarification, TPI continues to maintain that its "Highly Confidential" designation of {{}} Exhibit II-B-9 are appropriate, justified, and without prejudice to CSXT.

Sincerely,



Jeffrey O. Moreno

<sup>1</sup> Your reference to Franz Kafka is totally inapposite. None of the highly confidential information at issue contains any allegations (much less "lies") about CSXT; rather, they are allegations about the needs and requirements of TPI's customers.